

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 3, 2003

IN RE:

PETITION OF US LEC TENNESSEE, INC. FOR
DECLARATORY ORDER

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DOCKET NO.
02-00890

INITIAL ORDER ON JURISDICTION

This matter is before the Hearing Officer on *Airstream Wireless's Memorandum In Support Of Its Affirmative Defense That The Tennessee Regulatory Authority Lacks Subject Matter Jurisdiction Over This Cause* filed on March 4, 2003 and the *Brief of US LEC on the Jurisdiction of the Tennessee Regulatory Authority* filed March 14, 2003.

Background

On August 23, 2002, US LEC Tennessee, Inc. ("US LEC") commenced this action by filing with the Tennessee Regulatory Authority ("Authority" or "TRA") the *Petition For Declaratory Order* ("Petition"), seeking a ruling "as to the applicability of the TRA's rules and tariffs of US LEC to the factual circumstances" of this case.¹ The *Petition* asserts that US LEC entered into a contract to provide long distance telecommunications service to Airstream Wireless Services, Inc. ("Airstream"), but terminated such services based upon the following language contained in a tariff US LEC filed at the TRA:

¹ In re: *Petition of US LEC Tennessee, Inc. for Declaratory Order*, Docket No. 02-00890, *Petition for Declaratory Order*, p. 1 (August 23, 2002) (hereinafter *Petition for Declaratory Order*).

In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.²

US LEC's *Petition* requests the TRA to: (1) interpret the above quoted language authorizing termination of service in US LEC's tariff; and (2) find that US LEC properly terminated service to Airstream based on such tariff provision.

The *Petition* further asserts that Airstream filed an action in the Chancery Court of Shelby County on July 30, 2002 and obtained an *ex parte* temporary restraining order requiring US LEC to restore long distance telecommunications service to Airstream. US LEC responded by filing the *Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss*. It is undisputed that US LEC did not restore service to Airstream.

On September 18, 2002, US LEC amended its *Petition*, alleging that Airstream no longer seeks resumption of service, but is pursuing an action for damages in the Chancery Court. US LEC maintains that upon a joint request by both parties, the Chancery Court stayed proceedings in the lawsuit pending the Authority's ruling on the issues raised in US LEC's *Petition* and amendments thereto.

On September 23, 2002, Airstream filed the *Response of Airstream Wireless, Inc. to US LEC of Tennessee, Inc.'s Petition for Declaratory Order* ("Response"), arguing that the TRA lacks jurisdiction over the subject matter of this dispute. The *Response* contends that this dispute does not arise out of the Tennessee Telecommunications Act or require an interpretation of US LEC's tariff. Airstream argues that the gravamen of US LEC's *Petition* is fraud, particularly fraudulent inducement to contract, a matter over which the Chancery Court has jurisdiction. Airstream requests that the TRA: (1) deny

² *Tariff of US LEC Tennessee, Inc.*, TRA No. 3, § 2.5.5(D), p. 35 (filed December 1, 1997, effective February 1, 1998).

US LEC's Petition; (2) issue an order stating that the TRA lacks jurisdiction over this matter; or, alternatively, (3) issue an order stating that US LEC improperly terminated its service to Airstream on July 24, 2002.

At the regularly scheduled Authority Conference held on October 21, 2002, the panel assigned to this case³ unanimously voted to convene a contested case and appointed General Counsel or his designee to act as Hearing Officer to prepare the case for a determination on whether the Authority has jurisdiction over this action and, if necessary, to hear preliminary matters prior to a Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

On February 7, 2003, the Hearing Officer issued the *Notice of Briefing Schedule* ("Notice"), which directed Airstream to file no later than Tuesday, February 18, 2003 a brief with legal support on the jurisdictional issue raised as an affirmative defense in its *Response*. The *Notice* directed US LEC to file a response to Airstream's brief no later than Friday, February 28, 2003. The parties were directed to address the following issues:

- The TRA's jurisdictional authority over this dispute under Tenn. Code Ann. §§ 65-4-103, 65-4-104, 65-4-106, 65-4-117(1) and (3) and 65-5-210(a).
- Whether the TRA has jurisdiction to interpret the parties' Customer Service Agreement.
- Whether Airstream is a public utility within the meaning of Tenn. Code Ann. § 65-4-101(a).
- Whether Airstream is purchasing intrastate access service from US LEC.

On February 12, 2003, the parties filed the *Joint Motion to Modify the Current Briefing Schedule* requesting that each of those dates be extended by two weeks. The parties argued that the extension of time is appropriate and will cause no prejudice. On

³ The panel assigned to this case consists of Chairman Sara Kyle, Director Deborah Taylor Tate and Director Pat Miller.

February 13, 2003, the Hearing Officer issued the *Order Modifying Briefing Schedule*, which extended by two weeks the dates for filing the Briefs.

Positions of the Parties

On March 4, 2003, Airstream filed its *Memorandum In Support Of Its Affirmative Defense That The Tennessee Regulatory Authority Lacks Subject Matter Jurisdiction Over This Cause*. Airstream argues that the TRA lacks exclusive jurisdiction to interpret the parties' Customer Service Agreement and US LEC's tariffs because the General Assembly failed to clearly show its intent to divest the courts of jurisdiction. Airstream further argues that Tenn. Code Ann. § 65-3-120(a) specifically states that jurisdiction over civil claims is with the courts and not the TRA.⁴

As an alternative argument, Airstream maintains that the doctrine of primary jurisdiction has no application here because this case does not involve complex issues involving regulatory matters within the expertise of the TRA. Airstream contends that this case involves a straight-forward contract dispute, specifically, "whether Airstream fraudulently used US LEC's network thereby permitting US LEC to terminate the

⁴ Tenn. Code Ann. § 65-3-120(a) states:

(a) The circuit, chancery courts and courts of general sessions have jurisdiction of all suits of a civil nature arising under the provisions of this chapter and chapter 5 of this title, according to the nature of the suit and the amount involved, and the circuit and criminal courts have jurisdiction of all criminal proceedings so arising.

Airstream's argument is undermined by the fact that, with regard to the application of Chapter 3 of Title 65, entitled "Regulation of Railroads by Department of Transportation," the TRA possesses only "the powers conferred with reference to railroads regulated by the department of transportation." Tenn. Code Ann. § 65-4-105(a). By its plain language, Tenn. Code Ann. § 65-3-120(a) does not confer a "power" on the department of transportation. While Chapter 5 of Title 65 applies to the TRA, it is not relevant to the circumstances of this case. Chapter 5 is entitled "Regulation of Rates."

contract.”⁵ Relying on Second Circuit authority, Airstream asserts that the doctrine of primary jurisdiction does not apply to cases involving the enforcement of a tariff, as opposed to the reasonableness of a tariff, because the latter requires no special agency expertise.⁶

On March 14, 2003, the *Brief of US LEC on the Jurisdiction of the Tennessee Regulatory Authority* was filed. US LEC argues that the TRA has practically plenary jurisdiction to regulate public utilities. Relying on Tenn. Code Ann. § 65-5-210(a), US LEC maintains that this case falls within the TRA’s “original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408.” US LEC contends that courts lack jurisdiction in disputes involving the service of public utilities until the agency regulating the utility determines whether service should be provided. US LEC characterizes this action as a dispute about “the proper interpretation and application of US LEC’s tariffs and the rules of the TRA,” matters, it claims, within the exclusive jurisdiction of this agency.⁷ Alternatively, US LEC argues that even if the TRA and the Chancery Court have concurrent jurisdiction, this case is appropriate for resolution by the TRA under the doctrine of primary jurisdiction because unraveling the alleged fraudulent activity will require the agency’s special competence regarding the telecommunications network, normal calling patterns within the industry and inter-carrier compensation arrangements.

⁵ *In re: Petition of US LEC Tennessee, Inc. for Declaratory Order*, Docket No. 02-00890, *Airstream Wireless’s Memorandum In Support Of Its Affirmative Defense That The Tennessee Regulatory Authority Lacks Subject Matter Jurisdiction Over This Cause* p. 6 (March 4, 2003) (hereinafter *Memorandum In Support Of Its Affirmative Defense*).

⁶ *See id.* at 9 (citing *National Communications Ass’n, Inc. v. American Tel. & Tel. Co.*, 46 F.3d 220 (2nd Cir. 1995)).

⁷ *In re: Petition of US LEC Tennessee, Inc. for Declaratory Order*, Docket No. 02-00890, *Brief of US LEC on the Jurisdiction of the Tennessee Regulatory Authority*, p. 6 (March 14, 2003).

Findings of Fact and Conclusions of Law

It is well settled that the TRA has “practically plenary authority over the utilities within its jurisdiction.”⁸ Tenn. Code Ann. § 65-4-104 provides the TRA’s “primary grant of authority,”⁹ charging the agency with “general supervisory and regulatory power, jurisdiction, and control over all public utilities.”¹⁰ In the exercise of this general power, Tenn. Code Ann. § 65-4-117 authorizes the TRA to “fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[.]”¹¹ The law requires that the TRA’s statutory authority be liberally construed and “any doubts as to the existence or extent of a power conferred on the [TRA] . . . shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction. . . .”¹²

In addition to this broad, general power, the General Assembly specifically conferred upon the TRA the authority to “investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408 [the Tennessee Telecommunications Act].”¹³ The matter before the Authority involves contested issues of fact and law arising as a result of the Telecommunications Act.

⁸ *Tennessee Cable Television Ass’n v. Tennessee Public Service Comm’n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992).

⁹ *BellSouth Advertising and Publishing Corp. v. Tennessee Reg. Auth.*, 79 S.W.2d 506, 512 (Tenn. 2002), *cert. denied*, __U.S.__, 123 S. Ct. 1256 (2003) (hereinafter *BAPCO*).

¹⁰ Tenn. Code Ann. § 65-4-104.

¹¹ *BAPCO* at 511 (quoting Tenn. Code Ann. § 65-4-117(3)).

¹² *Id.* (quoting Tenn. Code Ann. § 65-4-106).

¹³ Tenn. Code Ann. § 65-5-210(a).

The dispute in this case arose after US LEC and Airstream entered into a Customer Service Agreement (“Agreement”) in April of 2002.¹⁴ US LEC agreed to provide Airstream with the following services for twelve months with a minimum monthly revenue commitment of \$40,000: “ADVANTAGE World //3643,” “MRC –LD Only T-1 //3391” and “NRC –Access only T-1 // 3392.”¹⁵ The Agreement authorized Airstream to make and receive intrastate, interstate and international calls. Under the Agreement, US LEC charged Airstream set rates for calls made to the following countries: \$.06 per call to the United Kingdom, \$.06 per call to Germany, \$.10 per call to Italy and \$.15 per call to Spain.¹⁶ In addition to these specific rates and services, the Agreement states:

This Agreement and all US LEC services are governed by the terms and conditions contained in US LEC’s tariffs and price lists (collectively, the “Tariffs”) filed with federal and state regulatory agencies.¹⁷

US LEC is a competing telecommunications service provider that was certificated by the Authority pursuant to Tenn. Code Ann. §65-4-201¹⁸ on September 18, 1997. On December 1, 1997, US LEC filed the Tariff¹⁹ referred to in the Agreement in accordance with Tenn. Comp. R. & Reg. 1220-4-2-.06(1), which requires each telephone utility to file with the Authority tariffs setting forth “the conditions and circumstances under which

¹⁴ See Customer Service Agreement, p. 9 (Exhibit 1 thereto).

¹⁵ *Id.*

¹⁶ *Id.*, Attachment A – Order Form.

¹⁷ *Id.* at ¶ 1, p. 4.

¹⁸ The Tennessee Telecommunications Act, 1995 Tenn. Pub. Acts, ch. 408, is codified at Tenn. Code Ann. § 65-1-201 *et seq.*, Tenn. Code Ann. § 65-2-101 *et seq.*, Tenn. Code Ann. § 65-4-101 *et seq.* and 65-5-201 *et seq.*

¹⁹ Tenn. Comp. R. & Reg. 1220-4-2-.03(s) defines a tariff as “the entire body of rates, tolls, charges, classifications and rules, adopted and filed with the [Authority] by a telephone utility.”

service will be furnished.”²⁰ The Tariff became effective on February 1, 1998. The Tariff’s plain language demonstrates its application to the instant dispute. The “Application of Tariff” section states:

This tariff sets forth the service offerings, rates, terms and conditions applicable to the furnishing of long distance services by US LEC Tennessee, Inc. to customers within the State of Tennessee.²¹

It is undisputed that the Agreement between US LEC and Airstream involves long distance services to be provided by US LEC within the State of Tennessee.

In an implicit acknowledgement that the outcome of this case turns on the application and construction of the Tariff, Airstream frames the ultimate issue as “whether Airstream fraudulently used US LEC’s network thereby permitting US LEC to terminate the contract.”²² The language that would permit US LEC to terminate the contract is in Section 2.5.5(E) of the Tariff, which authorizes US LEC to discontinue service without notice “[i]n the event of fraudulent use of the Company’s network.” Tenn. Comp. R. & Reg. 1220-4-2-.12, entitled “Reasons for Denying Service,” authorizes the termination of service for “non-compliance with the utility’s rules [tariffs] on file with the [Authority].”

²⁰ Tenn. Code Ann. § 65-5-202 authorizes the TRA to require every public utility to file a complete schedule of every service rendered within this state. Tenn. Comp. R. & Reg. 1220-4-2-.06(1) and all of the Rules adopted by the TRA are promulgated pursuant to Tenn. Code Ann. § 65-4-102, which “empower[s] and direct[s] [the Authority] to adopt rules . . . implementing, interpreting or making specific the various laws which it enforces or administers.” Tenn. Comp. R. & Reg. 1220-4-2-.06(1) states:

Each telephone utility shall file with the Commission tariffs which set forth the various exchange areas, base rate areas, the conditions and circumstances under which service will be furnished and defining the classes and grades of service available to customers, all in accordance with the rules and regulations governing the filing of tariffs as prescribed by the Commission in Chapter 1220-4-1 (General Public Utility Rules Applicable to All Utilities).

²¹ Tariff No. 3 of US LEC Tennessee, Inc., p. 8 (December 1, 1997).

²² *Memorandum In Support Of Affirmative Defense*, p. 6.

Determining whether Airstream fraudulently used US LEC's network and whether such use authorized US LEC to terminate the contract will require construction of both the contract and the Tariff in light of the TRA's Rules and Regulations and common industry practice. Weighing the evidence presented on the issue of fraudulent use of US LEC's network as alleged in the *Petition* will require significant knowledge of highly complex technical aspects of the industry. Clearly, this case "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [this] administrative body."²³ This fact invokes the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction "generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the competence of that agency."²⁴ The two factors determinative of whether jurisdiction is more appropriate in an administrative agency than a court are:

(1) will deferral [to the agency] be conducive toward uniformity of decision between courts and the agency and (2) will deferral make possible the utilization of pertinent agency expertise.²⁵

As to the first factor, this action involves the application and interpretation of TRA Rules and Regulations and standard language included in a tariff filed with this agency. Accepting jurisdiction in this case will promote uniformity of decision and "allow the [a]gency to perform its primary duty of control over the exercise of its

²³ *Freels v. Northrup*, 678 S.W.2d 55, 57 (Tenn. Ct. App. 1984); see also *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997).

²⁴ *Id.*; see also *Breeden v. Southern Bell Tel. & Tel. Co.*, 285 S.W.2d 346, 350-51 (Tenn. 1955) (authorizing the TRA's predecessor agency to exercise primary jurisdiction over a dispute involving the extension of telecommunications service).

²⁵ *Freels*, 678 S.W.2d at 57.

functions by its officials rather than have said officials look directly to the courts for guidance.”²⁶

The second factor weighs even more in favor of the exercise of the TRA’s jurisdiction. A reasoned decision in this case will require significant knowledge of the business practices of the telecommunications industry, such as the commonly understood meaning of fraudulent use of a network in the context of the Tariff, and will implicate policy considerations within the TRA’s particular field of expertise. The case may also involve complex technical and mechanical aspects of the provision of long distance service which are not generally within the conventional experience of industry outsiders. For example, in explaining its decision to terminate service to Airstream, US LEC contends that (1) the cost of handling international long distance calls varies substantially depending upon whether the call is made to a wireless or a land-line telephone, due in part, to unusually high termination charges imposed by some European wireless carriers and (2) based upon “normal calling patterns” approximately ten percent (10 %) of all long distance calls are made to wireless telephones.²⁷ Technical knowledge of the telecommunications industry is vital for full consideration of these contentions.

The doctrine of primary jurisdiction generally limits an agency’s jurisdictional reach to matters within its special expertise.²⁸ In light of this rule, the scope of the TRA’s jurisdiction in this case is necessarily limited to an application of the facts to the terms of the Tariff, particularly the provision allowing for termination on the basis of

²⁶ *Crawford v. Tennessee Consol. Ret. Sys.*, 732 S.W.2d 293, 297 (Tenn. Ct. App. 1987) (Tenn. R. App. 11 application denied, June 22, 1987) (applying the doctrine of primary jurisdiction to affirm Chancery Court’s deferral of jurisdiction to state agency).

²⁷ *Petition for Declaratory Order*, p. 3-4.

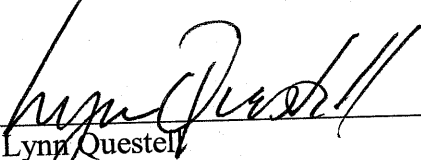
²⁸ *See, e.g., Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm’n*, No. 89-298-II, 1990 WL 20132 at 2-3 (Tenn. Ct. App. March 7, 1990).

fraudulent use of US LEC's network.²⁹ Issues beyond the scope of the TRA's special expertise, such as the calculation of damages or any claims relating to fraudulent inducement to contract, will not be addressed by the TRA in this proceeding.

IT IS THEREFORE ORDERED THAT:

1. The affirmative defense of Airstream Wireless Services, Inc. asserting that the Tennessee Regulatory Authority lacks subject matter jurisdiction in this case is rejected.³⁰

2. The Tennessee Regulatory Authority has and will exercise subject matter jurisdiction over matters relating to the Tariff of US LEC Tennessee, Inc. as pleaded in the *Petition of US LEC for Declaratory Order*, and declines to reach claims beyond the purview of the Tariff, such as those relating to fraudulent inducement to contract and the calculation of damages, if any.


Lynn Questel
Hearing Officer

²⁹ See Tenn. Code Ann. § 65-4-204.

³⁰ This Initial Order is issued pursuant to Tenn. Code Ann. § 4-5-314 and shall become final within fifteen (15) days from the date of entry unless reviewed in accordance with Tenn. Code Ann. § 4-5-315. See Tenn. Comp. R. & Reg. 1220-1-2-.20; see also Tenn. Code Ann. § 4-5-322.